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No. 01-1799

In the

Supreme Court of the United States

CENTRAL PINES LAND COMPANY; TOWER MINERALS COMPANY, INC.; JACK E. LAWTON, JR.; EVELYN GAY LAWTON DUHON; LINDA LEW LAWTON DROST; D, S & T, INC; and DROST & BRAME, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; TEXACO EXPLORATION AND PRODUCTION INC.; SWIFT ENERGY COMPANY; CHESAPEAKE OPERATING, INC.; C. H. C. GERARD; and RME PETROLEUM COMPANY,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Although the Court of Appeals for the Fifth Circuit used the proper federal choice-of-law rules, its ruling totally ignored them. The Court applied federal common law to a contractual relationship to which the United States was never a party. Petitioners are aware of no other case which applied federal law in such a situation. Respondent has not cited any such case. This lack of case authority may be because, in one of the early federal common law cases, albeit in *dicta*, this Court directly foreclosed the application of federal common law where the United States simply substituted itself for

another party as successor to rights governed by state law. ***United States v. Standard Oil Co. of California***, 332 U.S. 301, 309 (1947). If the reach of federal common law is to be extended beyond any past precedent, such extension should be decided by this Court.

But in any event, no significant conflict between a federal interest and state law has been shown. There is clearly no federal interest in default rules of law. As respondent states: "default rules do not necessarily favor the United States" (Opp. 9). The federal interest constructed by the Fifth Circuit is clearly non-existent. Furthermore, the more limited federal interest "in ensuring that the terms of land acquisitions are not changed after the fact," simply does not apply to the facts of this case (Opp. 9). If negotiations by the United States with one party about property of another party creates federal rights of the United States in said property (as respondent argues (Opp. 8)), there is no limit to the reach of federal common law.

This case is of significant importance, not only to the owners of mineral servitudes affecting over 435,000 acres in Louisiana, but to everyone whose property may have been of interest to the United States, now or in the past. If the Fifth Circuit opinion stands, simple interest in property by the United States will result in federal law being applicable thereto, without even notice to the property owner.

A. Federal Common Law Does Not Apply to a Contract Between Private Individuals

The United States "substituted itself for others as successor to rights governed by state law" in this case. ***Standard Oil Co.***, *supra*. (Gulf Lumber Company sold all of the mineral rights to a third party, plaintiffs' ancestor, four years before the first sale of the property from Gulf to the Government. The Government merely "stepped into the shoes" of Gulf as landowner subject to the outstanding mineral rights.) The Government does not dispute this fact; nor does it assert that this Court's *dicta* pronouncement in ***Standard Oil*** that in such cases, state law is to be applied, is

incorrect (Opp. 11). The Government argues that here the United States did not "simply" substitute itself; there was an additional fact -- the passage of a law affecting the Government's expectations -- which renders this rule of law inapplicable. The Government calls its expectations "mineral interests." However, these expectations could only be mineral interests if they already were subject to federal law. Under Louisiana state law, such expectations were clearly not mineral interests or property interests (Pet. 8-9). Therefore, the Government's position must be that even before Act 315 of 1940 was passed, federal law applied and gave it federal rights in the minerals. The United States could not have had state law rights in the minerals -- there were no legal rights under state law in its expectations. The result in this case is directly at odds with this Court's pronouncement in ***Standard Oil***.

Although the statement is *dicta*, the Government has not cited a case holding to the contrary. Likewise, it has not given a rationale as to why the United States, when substituting itself for others, *should* have greater rights than the prior party. Correct *dicta* is not be disregarded or rejected simply because it is *dicta*.

The Government asserts that ***Standard Oil*** does not require that retroactive effect be given to state legislation altering the rights of the United States (Opp. 11). It does not require it, but it does not prohibit it. As we have stated, ***Standard Oil*** does declare that where the United States has simply substituted itself for others, its rights are controlled by state law. If Act 315 of 1940 had declared that all mineral rights bearing upon all lands in Louisiana were no longer subject to prescription, would the rights of the United States have been affected by the change? Such a change would have been valid as to existing rights because it simply abolishes a rule of prescription which had not run, which rule had been based upon a presumption of abandonment. ***Whitney National Bank v. Little Creek Oil Co.***, 212 La. 949, 33 So.2d 693 (1947). If the change in law is otherwise valid, the rights of the United States would and should be affected. Its rights should be no greater than those of anyone

else.

The Court of Appeal must have ruled that if such a universal change occurred, all outstanding mineral rights, except those affecting lands of the United States, would become imprescriptible. Those mineral rights affecting lands owned by the United States would remain subject to the old law of prescription -- which law would then exist only for lands of the United States. Where the Government's argument is viewed from this perspective, it is obvious that it is just an argument for "more money."

Obviously, the United States *is* asking to be treated better than other landowners. It wants to be able to pick and choose those laws which will apply to it. Other landowners cannot escape valid laws. On what basis can the United States? If the United States wants to challenge Art. 315 of 1940, it may do so. But to do so on the basis of state law being inapplicable flies in the face of all of this Court's federal common law jurisprudence, as pointed out in our Petition for Certiorari.

Respondent totally misunderstands our statement that the Weeks Forestry Art did not explicitly authorize the acquisition of mineral rights separately from the land. We agree that both the Weeks Forestry Art and the Migratory Bird Conservation Act authorized the acquisition of minerals as part of land acquisitions (Opp. 12 n.6). However, in the instant case, the mineral rights were separately owned. Respondent has pointed to no provision of the Weeks Forestry Act authorizing or requiring separate mineral acquisitions. In ***Little Lake***, the mineral rights were being acquired with the land by contract. ***United States v. Little Lake Misere Land Co.***, 412 U.S. 580 (1973). There was a federal contract directly affecting the mineral rights. In the instant case, the land acquisition could not affect the mineral rights. The mineral rights were owned by a third party. In the instant case, there were no federal transactions involving mineral rights. Respondent has failed to show how the ownership of third party mineral rights bears at all upon this federal regulatory program, much less heavily.

B. Federal Common Law May Only Be Applied Where There is a Significant Conflict Between a Genuinely Identifiable Federal Policy or Interest and State Law

Respondent asserts that there is a legitimate federal interest in ensuring that the terms of land acquisitions are not changed after the fact (Opp. 9). This statement is correct; it was the basis of the holding in ***Little Lake***. However, it is totally inapplicable to the instant case. Petitioners do not wish to change the terms of any land acquisition contract. There was never a contract between the United States and the mineral owner – petitioners' ancestor-in-title.

In ***Little Lake***, this Court specifically deferred until another day one of the exact issues before the Court in this case: the application of Act 315 of 1940 to an unrestricted mineral servitude either created in an act of transfer to the Government or which pre-existed the acquisition by the Government in favor of a third party. In distinguishing such cases, this Court noted:

> Were the terms of the mineral reservations at issue here less detailed and specific, it might be said that the Government acknowledged and intended interest to be bound by unforeseeable changes in state law.

Little Lake, *supra*, at 602-603. (*A fortiori*, the Government should be bound by foreseeable changes in state law (Pet. 14).) This statement recognized implicitly that when the Government acquires property rights in a particular state, it does so against the background of the entire *lex loci*, including changes to rules of prescription. The Court of Appeals ignored this Court's caveat above and extended the rule of ***Clearfield Trust Co. v. United States***, 318 U.S. 363 (1943), well beyond the limited contractual application that this Court intended in ***Little Lake***.

Respondent asserts that no inquiry was made in ***Little Lake*** as to whether some specific provision of the Migratory Bird Conservation Act was interfered with or undermined by third party mineral ownership (Opp. 9 n. 4).

This is correct. The federal policy or interest found there was "the general importance of certainty and finality under land acquisition programs" (Opp. 9 n. 4). But here, there is no such federal interest of "general importance." There is no contract affecting minerals which needs certainty or finality. In any event, any purchase of land in Louisiana subject to outstanding mineral rights of necessity creates uncertainty. The landowner can never be certain whether the mineral owner will, by inaction, allow the minerals to prescribe, or be certain that the legislature will not repeal or modify the rule of prescription.

In ***Little Lake***, Act 315 of 1940 ran afoul of federal interests because the plaintiff sought its application "to a consumated land transaction under a contract which specifically defined conditions for prolonging the vendor's mineral reservation," and said application "deprives it [the United States] of bargained-for contractual interests." ***Little Lake***, *supra*, at 598. In this case, the United States entered into no similar contract.

The Court of Appeals "judicially constructed" an issue of general importance – "the application of default legal rules in place at the time of contract" (Pet. 11a). However, as clearly shown in our Petition, it makes no logical or legal sense for this to be a federal interest. (Pet. 13-15). In fact, respondent apparently concedes that there is no such federal interest of general importance – "default rules do not necessarily favor the United States" (Opp. 9). In any event, the United States has never shown the basis for such purported interest. Likewise, the United States has never argued the existence of such interest in this case.

No general policy or interest is applicable in the instant case. Therefore, if there is a federal policy or interest it must be based on specific facts of this case. The only possible evidence in this regard is language found in an appraisal report and in two of the land acquisition agreements, as we stated in our Petition (Pet. 16-17). Respondent basically admits this fact – this is the only evidence to which it refers (Opp. 8). But such evidence does not even tend to prove, much less establish as an undisputed

summary judgment fact, that there was a federal interest in the instant third party mineral rights.

There is no evidence in the record that the United States showed or discussed its appraisal with anyone. How could an internal appraisal create in the United States an interest in third party mineral rights? The appraisal simply showed that the United States recognized that the outstanding mineral rights had value. (No one has ever disputed this fact.) The Government is arguing that because it valued a third party's mineral rights, such mineral rights became subject to federal common law. Such an argument falls of its own weight.

The language in the two acquisitions, affecting only a small amount of the acreage in dispute, by which the United States purported to grant Gulf Lumber Company reversionary rights in mineral rights owned by S. H. Fullerton (petitioners' ancestor-in-title) certainly could not give the United States a federal interest in those minerals. How can a contract between the United States and Gulf Lumber Company purporting to affect the mineral rights of a third party give the United States a federal interest in those mineral rights?

Even if one looks only to the documents relied upon by the United States, there is no federal interest in these third party mineral rights. Absent an actual federal interest, state law must apply. In any event, this matter was presented on summary judgment. Petitioners presented voluminous evidence to show that the purported federal interest did not exist (Pet. 4, 16-17). The existence of the purported federal interest is not an undisputed material fact. What law should be applied is at least in dispute.

CONCLUSION

Despite the Court of Appeals' decision and the Government's protests, the decision herein is not foreclosed by the decision in ***Little Lake***. This case involves issues specifically not addressed in that decision. These important issues of federal law should be resolved by this Court.

For the reasons set forth in the Petition for Writ of Certiorari and in this Reply Brief, this Court should grant a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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